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No. 63.

Office Supreme Court, U. S.
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JAMES D. MAHER
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Supreme Court of the United States,

OCTOBER TERM, 1912.

~~No. 629.~~

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY, (Limited),
Respondent-Defendant-in-Error.

SUPPLEMENTAL BRIEF OF RESPONDENT-DEFENDANT-IN-ERROR UPON THE QUESTIONS ATTEMPTED TO BE RAISED BY THE SO-CALLED AMENDED REMITTITUR.

EDMUND L. MOONEY,
Attorney for Defendant-in-Error,
37 Wall Street,
New York City.

EDMUND L. MOONEY,
CHARLES T. RUSSELL,
FREDERICK A. CARD,
Of Counsel.

B. H. TYRRELL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 829.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY,
Respondent-
Defendant-in-Error.

Supplemental Brief of Respondent-Defendant-in-Error upon the questions attempted to be raised by the so-called amended remittitur.

POINT I.

The Court of Appeals of the State of New York had no power to amend the remittitur after the lapse of three years from the time this Court had issued its writ of error.

In this case, the certification of Point 12 of the relator's brief was made by the Court of Appeals

three years after the writ of error had been granted by this Court and long after the record and proceedings had been transferred to this Court. When the certification was made, therefore, the Court of Appeals of the State of New York did not have the case before it and had lost control of the record, so that said certification could not become a part of the record. In *Home for Incurables* vs. *the City of New York*, 187 U. S. 155, it was held that a certificate of the Chief Judge of the Court of Appeals of the State of New York to the effect that Federal questions were raised and decided, made at a time when the case was not before it or under its control, was not a part of the record and could not give this Court jurisdiction to determine a Federal question not appearing otherwise from the record to have been brought to the attention of the State Court, Page 158. The certification of the brief was also improper because it was made after the rendition of final judgment without a rehearing upon the merits: *Miller* vs. *Cornwall Railroad Company*, 168 U. S. 131-134; *Weber* vs. *Rogan*, 188 U. S. 10-14.

POINT II.

The so-called amended remittitur, containing Point 12 of the Relator's brief in the Court of Appeals, is no part of the record, properly speaking, before this Court, and should not be considered in determining whether any Federal question was raised or decided in the Court of Appeals of the State of New York.

The certification of Point 12 of the Relator's brief, although in the form of an order purporting to amend the remittitur, merely certifies that Point 12 and the matter contained therein was submitted to the Court on the argument of the appeal. It certainly can have no other or greater effect than to present to this Court part of the argument of counsel, verified as correct by the certificate or order.

It has several times been held by this Court that arguments of counsel form no part of the record. *Gibson* vs. *Chouteau*, 75 U. S. (8 Wall.) 314-318; *Sayward* vs. *Denny*, 158 U. S., 180-184.

In N. Y. C. & H. R. R. R. Co. vs. *City of New York*, 186 U. S. 269, the appellant, in an attempt to show the raising of a Federal question, relied upon a copy of its brief, certified by the Chief Judge of the Court of Appeals of the State of New York, as containing certain matters. In the opinion of this Court last cited the case of *Zadig* vs. *Baldwin*, 166 U. S. 485, is cited and quoted from as showing that the brief did not become a part of the record and could not raise a Federal

question when the record did not disclose that it was otherwise raised. Hence, the brief is not to be considered as a part of the record in determining whether a Federal question was raised and decided.

Whatever may be considered as to the effect of the briefs submitted to the State Court, it seems to be settled in this Court that they cannot, in themselves, be considered as sufficient to raise a Federal question not otherwise properly appearing to have been raised from the record.

As we have noted, they do not become a part of the record proper. In *Glenn* vs. *Garth, 147 U. S., 360*, it was said in the opinion of this Court, Page 370: "nor can the contention of counsel, that the Virginia Statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the Constitution or laws of the United States."

The reason for the insistence of this Court that the Federal question shall be raised in the Court below and the fact that it was raised clearly appear from the record, is stated in the opinion of Mr. Justice Taney in *Grand Gulf R. R. & Banking Co., etc.* vs. *Marshall*, 53 U. S. (12 Howard) 165, to be, that if the appellant omits to raise the point properly on the record, there is no reason to permit him to harass the adverse party by a writ of error to this Court, when for aught that appears in the record the judgment of the State Court might have been in his favor if its attention had been directed to the question. Hence, the rule is just that the omission to raise the question properly in the record cannot be cured by the briefs or arguments of counsel, and certainly it should not be held to be cured by the certification of a por-

tion of the brief of the relator in the Court below made three years after the granting of the writ of error.

POINT III.

Assuming, for the sake of argument, that Point 12 of the Appellant's brief in the Court of Appeals is before this Court, it did not in reality raise any Federal question.

In N. Y. C. & H. R. R. R. Co. vs. *The City of New York*, 186 U. S., 269, a copy of appellant's printed brief had been certified by a Judge of the Court below. It was said:

> "But assuming without intimating an opinion to that effect, that the raising of a Federal question in the brief might be sufficient, it is well settled in this court that it must be made to appear that some provision of the Federal, *as distinguished from the state*, Constitution was relied upon, *and that such provision must be set forth.*" (Italics ours.)

This court quoted from the brief so submitted and concluded that it did not properly raise a Federal, as distinguished from a state question (Pages 272 and 273). To warrant a review by this court, it must appear from the record that the appellant specifically claimed and set up in the State Court, rights under the Constitution of the United States. *Chicago & Northwestern Railway Co.* vs. *City of Chicago*, 164 U. S., 454-456. It is not sufficient

that the constitutionality of the law be raised, for that only raises the constitutionality under the State Constitution. *Kansas Endowment & Benevolent Association* vs. *State of Kansas*, 120 U. S., 103-104; *Yazoo & Mississippi Valley Railroad Co.* vs. *Adams*, 180 U. S., 1. Nor that the question raised is one of the construction of a State Statute and not its validity under the Federal Constitution. *Baltimore & Potomac R. R. Co.* vs. *Hopkins*, 130 U. S., 210; *Weber* vs. *Rogan*, 188 U. S., 10-14.

In this case, the Court has certified only Point 12 of the appellant's brief in that court, from which it is fair to assume that the Federal question, if raised at all, was raised therein.

Point 12 consists only of two pages. On the first page it is stated in a headline that the grant by the state, accepted by the Lines Company, is protected by the "Constitutional guarantees" and the Resolution of the Board of Estimate and Apportionment of April, 1906 was a nullity. The case of *Mayer* vs. *Second Ave. Railways Co.*, 32 N. Y., 261 is cited to support this proposition, as well as the case of *Dusenbury* vs. *New York &c. Traction Co.*, 46 App. Div., 267. On the following page a Virginia case and an Illinois case are cited and quoted from. The statement quoted from the headline and the cases cited to support the proposition apparently relate only to the State Law and not to the Constitution of the United States. The words "Constitutional Guarantees" do not properly refer to the guarantees of several constitutions, but, on the contrary, to several guarantees of the same constitution, and cannot be properly construed to refer to the Constitution of the United States in connection with the Consti-

tution of the State of New York. The only other matter contained in said Point 12 is as follows:—

> "*In Fletcher* vs. *Peck*, 6 Cranch, 87, the Legislature of Georgia attempted to annul a grant of State lands made by a previous Legislature.
>
> "The Court held that the grant under the first enactment constituted, when accepted, a contract within the protection of the Federal Constitution and that the second enactment, being an impairment of the contract, was void."

This statement of what was decided in *Fletcher* vs. *Peck*, is rather a quotation than an argument, and cannot, we contend, amount to a claim of right under the Constitution of the United States, or take the place of the specific claim under such Constitution which is required to raise a Federal Question. *Chicago & Northwestern Railway Co.* vs. *the City of Chicago*, 164 U. S., 454, 456; *Layton* vs. *State of Missouri*, 187 U. S., 356.

POINT IV.

The Brief of the plaintiff-in-error upon the questions attempted to be raised by the so-called amended remittitur, does not meet our contentions.

The plaintiff-in-error applied to the State Court for a formal certificate stating that a Federal question had been raised and determined, but succeeded only in obtaining a certification of Point XII of its Brief in the State Court. While it is stated on p. 4 of the supplemental brief that

Point XII is now made a part of the record,—no cases are cited to sustain this claim, the only cases cited being those cited on page 2 which are to the effect that the opinion of the State Court,—or its certificate, where there is no opinion, may be considered for the purpose of aiding in determining whether a Federal question was raised, where there is no doubt as to it, but cannot import such question into the record or give jurisdiction to review where it is not otherwise raised by the record.

The plaintiff-in-error argues that the order is in the nature of a certificate and that it will inform the Court, as a certificate would, that a Federal question was raised and argued, yet does not rely on it to show this. The brief shows, that relator, fearing the Federal question was not raised by the record, tried to cure this defect by obtaining a formal certificate and failing to obtain it now seeks to give an unwarranted effect to a mere certification of a part of its brief in the State Court.

We contend now, as heretofore, that no Federal question was raised by the record, that the opinion of the Courts below did not pass upon any such question nor did the brief raise it.

Respectfully submitted,

Edmund L. Mooney,
Attorney for defendant-in-error,
37 Wall Street,
New York City.

Edmund L. Mooney,
Charles T. Russell,
Frederick A. Card,
of Counsel.

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Office Supreme Court U. S.
OCT 5 1914
JAMES D. MAHER
Clerk

Supreme Court of the United States

THE NEW YORK ELECTRIC LINES COMPANY, Relator-Plaintiff-in-Error, against EMPIRE CITY SUBWAY COMPANY, Respondent-Defendant-in-Error.	October Term, 1913— No. 370.

PLEASE TAKE NOTICE that upon the affidavit of Wayne W. Wilson, verified on the 1st day of October, 1914, the motion of which the annexed is a copy will be submitted to the Supreme Court of the United States, at the Capitol, in the City of Washington, D. C., on the 12th day of October, 1914, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of certiorari for diminution of the record, directed to the Supreme Court of the State of New York, in and for the County of New York, and for

such other and further relief as to the Court may seem just.

New York, October 1, 1914.

J. Aspinwall Hodge,
Attorney for Plaintiff-in-Error,
5 Nassau Street,
Borough of Manhattan,
New York City.

Alton B. Parker,
of Counsel,
111 Broadway,
New York City.

To
Mr. Edmund L. Mooney,
Attorney for Defendant-in-Error,
37 Wall Street,
Borough of Manhattan,
New York City.

Service of the foregoing notice and the motion and affidavit annexed thereto is hereby admitted this 2nd day of October, 1914.

EDMUND L. MOONEY,
Attorney for Defendant-in-Error,
37 Wall Street,
New York City.

SUPREME COURT OF THE UNITED STATES.

THE NEW YORK ELECTRIC LINES COMPANY, Relator-Plaintiff-in-Error, against EMPIRE CITY SUBWAY COMPANY, Respondent-Defendant-in-Error.	October Term, 1913— No. 370.

Now comes the plaintiff-in-error, by J. Aspinwall Hodge, its attorney, and moves this Honorable Court, for a writ of certiorari for diminution of the record, directed to the Supreme Court of the State of New York, in and for the County of New York, directing said Court to return to this Court, the record and proceedings in this case, with all things concerning the same, as fully and entirely as they remain of record in said Supreme Court of the State of New York, in and for the County of New York, including the order made in this cause by the Court of Appeals of the State of New York, on the 28th day of April, 1914, and the amendment made to the remittitur herein pursuant to said order, not now contained in the transcript of the record herein, filed in this Court, and for such other and further relief as to the Court may seem just.

J. Aspinwall Hodge,
Attorney for Plaintiff-in-Error,
5 Nassau Street,
Borough of Manhattan,
New York City.

ALTON B. PARKER,
of Counsel,
111 Broadway,
New York City.

SUPREME COURT OF THE UNITED STATES.

THE NEW YORK ELECTRIC LINES COMPANY, Relator-Plaintiff-in-Error, against EMPIRE CITY SUBWAY COMPANY, Respondent-Defendant-in-Error.	October Term, 1913— No. 370.

State of New York, County of New York, } ss.:

Wayne W. Wilson, being duly sworn, deposes and says:

I. He is the Secretary of the New York Electric Lines Company, the plaintiff-in-error herein.

II. Heretofore and on or about the 16th day of October, 1912, a writ of error was allowed by the Honorable Charles E. Hughes, one of the Associate Justices of this Court, and issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, in and for the County of New York, to bring up for review the final order of the Court of Appeals of the State of New York, in this suit.

III. Thereafter and on or about the 25th day of October, 1912, a transcript of the record herein, duly certified by the Clerk of the Supreme Court of the State of New York, in and for the County of New York, was filed in this Court, pursuant to said writ of error.

IV. Thereafter and on or about the 28th day of April, 1914, an order was made by the Court of Appeals of the State of New York, directing that the Supreme Court of the State of New York, in and for the County of New York, be requested to return the remittitur herein to said Court of Appeals, and that the said remittitur be amended by adding thereto and incorporating therein certain statements set forth in said order, as appears by the report in 211 New York Reports, wherein it is stated:

> "Motion to amend remittitur so as to show "the submission in appellant's brief of a point "involving a question under the Federal Con- "stitution granted."

V. Thereafter the Supreme Court of the State of New York, in and for the County of New York, returned the said remittitur to the said Court of Appeals, and thereupon the said remittitur was amended by adding thereto and incorporating therein the said statements and the said order. Thereafter the said remittitur, as amended as aforesaid, was returned by the said Court of Appeals to the Supreme Court of the State of New York, in and for the County of New York. The said remittitur is now on file in said court. A copy of said order of the Court of Appeals, and of said amendment to the said remittitur are hereunto annexed, marked Exhibits A and B, respectively and made a part of this affidavit.

VI. The transcript of the record filed herein in this Court, does not contain the said order or the said amendment to the remittitur, as the record was filed in this Court prior to the time of the

making of the said order and of the said amendment. Unless said order and said amendment are included in the transcript of the record herein, the said transcript will not be full and complete.

VII. Inasmuch as it was expected that this cause would be reached for argument in this Court last spring, and there was therefore not sufficient time to formally amend the record then, the following stipulation was entered into between the attorneys for the respective parties and filed with the Clerk of this Court:

"IT IS HEREBY STIPULATED by the counsel for the respective parties in the above entitled case:

"A. That annexed hereto, marked 'Exhibit A,' is an order to show cause granted by the Chief Judge of the Court of Appeals of the State of New York, dated the 18th day of April, 1914, returnable before the Court of Appeals, on the 22nd day of April, 1914, together with the affidavits in support of said order to show cause, and the affidavits submitted in opposition to the motion upon said order to show cause.

"B. That annexed hereto, marked 'Exhibit B' is a copy of an order made by the Court of Appeals on the 28th day of April, 1914.

"C. That after the entry of the last mentioned order, the Clerk of the Supreme Court of the State of New York, returned the remittitur to the said Court of Appeals, and thereupon there was annexed to the said remittitur the papers marked 'Exhibit C.'

"D. That this stipulation, together with the papers hereto annexed may be filed as part of the record

before this Court, and may be handed to the Court on or before the argument herein, with the same effect and no other as if a writ of certiorari had been issued out of this Court to the Supreme Court of New York, directing a return to this Court of the above mentioned papers, and as if the above mentioned papers had been so returned; but it is stipulated that none of the aforesaid stipulations or any part of them shall be deemed or construed to be any waiver of the right of the respondent to object, which it now does, and may repeat upon the argument herein, to wit:

"That the Court of Appeals of the State of New York had no power or authority to direct the return of said remittitur or to amend the same, or return the same to the Supreme Court of the State of New York; that this Court upon the return should not, under the practice in such cases prevailing, consider the said papers or any of them, as properly part of the record herein.

"IT IS FURTHER STIPULATED, UNDERSTOOD AND AGREED, that the respondent herein shall be in the same position before this Court in respect to all objections that it would occupy, if, upon the taking of each of the foregoing steps and proceedings, all rights had been fully reserved to the respondent to make objection before this Court at this time, and to repeat the same on the argument herein, to each of the aforesaid steps and proceedings, and with the same effect as if said objection or objections had been taken at the time the said steps, motions, proceedings and returns were made.

"IT IS ALSO UNDERSTOOD AND AGREED that the relator will forthwith cause this stipula-

tion, together with the exhibits hereto annexed, to be printed and presented to this Court on or before the argument herein, and that the respondent will not object to a motion or request by the relator to the Court to accept the same as part of the record, subject, however, to each and all of the aforesaid objections, and also subject to all objections as to the effect of the said papers upon the rights of the parties hereto.

"IT IS FURTHER STIPULATED that the relator hereby consents, and will consent upon the argument that counsel for the respondent may file or hand to the Court with its permission any additional brief that he may desire dealing with the question raised by this stipulation, and that the relator will deliver a copy of any brief which it may desire to present (with the Court's permission) on or before the argument upon the said question, to the respondent's counsel, on Monday the 4th instant, and the respondent on its part will cause to be delivered to the relator's counsel, on Tuesday the 5th instant, a copy of any brief upon said question which it proposes to present to the Court on or before the argument.

"Dated, May 1, 1914.

J. ASPINWALL HODGE,
Atty. for Relator-Plaintiff-in-Error.

EDMUND L. MOONEY,
Atty. for Respondent-Defendant-in-Error."

But inasmuch as the case was not reached during the term last past, it is desired to formally amend the record in this cause in accordance with the rules and practice of this court, so as to include in said record the remittitur as amended by the Court of Appeals of the State of New York.

VII. This application could not have been made heretofore, inasmuch as the order directing the amendment of the remittitur was not made until the 28th day of April, 1914, and the remittitur as amended was not returned to the Supreme Court of the State of New York in and for the County of New York, until the 4th day of May, 1914.

WAYNE W. WILSON.

Sworn to before me this
1st day of October, 1914.

ALEXANDER HOLTZOFF,
Notary Public No. 1592,
New York County.

EXHIBIT A.

Order of Court of Appeals Amending Remittitur.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York held at the Capitol in the City of Albany, on the twenty-eighth day of April, A. D. 1914.

Present—Hon. WILLARD BARTLETT, Chief Judge, presiding.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY, Limited.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Appellant,

THE EMPIRE CITY SUBWAY COMPANY,
Respondent.

An order to show cause having been granted by the Hon. Willard Bartlett, Chief Judge of this

Court, requiring the respondent to show cause why this Court or its Chief Judge should not make a certificate in the above entitled proceeding as in said order to show cause is more fully stated; why the remittitur therein should not be amended by adding thereto said certificate; why a duplicate original of said certificate or a certified copy thereof should not be delivered to the relator's attorney; and why the appellant should not have such other further like or different relief as might be just; and the motion upon said order to show cause regularly coming on to be heard.

Now, on reading and filing the order to show cause aforesaid, dated the 18th day of April, 1914, the affidavit of Wayne W. Wilson verified April 18, 1914, the affidavit of Alton B. Parker verified April 17, 1914, and the affidavit of J. Aspinwall Hodge verified April 18, 1914, in support of said application; and the affidavits of Charles T. Russell and Edmund L. Mooney, verified April 22, 1914, read in opposition thereto and, after hearing J. Aspinwall Hodge, Esq., of counsel for the relator-appellant, for the motion, and Edmund L. Mooney, Esq., of counsel for the respondent in opposition thereto, and due deliberation having been had, it is

ORDERED, that the Supreme Court of the State of New York in and for the County of New York, be and it is hereby requested to return the remittitur herein to this Court; and that upon the return thereof the said remittitur be, and the same is, hereby amended by adding thereto and incorporating therein the following statement:

"Upon the argument of the appeal in this cause "before the Court of Appeals, there was submitted

"to the Court by counsel for the appellant and in "its behalf, a brief containing the following point:"

POINT XII.

The grant by the State accepted by the Lines Company is protected by the constitutional guarantees, and the resolution of the Board of Estimate and Apportionment of April, 1906, was a nullity.

This proposition was sustained by the cases we have already quoted under several of the foregoing points, notably, Points II, VI, VIII, IX, X and XI. We believe it is scarcely necessary to discuss this proposition, not only because the three preceding points dispose of the question involved; but also because the proposition that the contract or grant is protected by the constitutional guarantees has been so often recognized in the previous litigation, both in the *Squire* and *Ellison* cases.

In *Mayor* vs. *Second Avenue Railroad Company*, 32 N. Y., 261 this Court said:

> "Assuming that the Common Council had "power to make the grant, then its *acceptance* "by Pearsall and his associates, signified by the "execution of the agreement with the condi- "tions annexed thereto, and the duties and ob- "ligations resulting therefrom, invested the lat- "ter with the right of property in the franchise *"which the Common Council could not take "away or impair by any subsequent act of its "own."*

Even when there is a condition which the holder of the franchise has broken, forfeiture must be enforced in the Courts, as is held in *Dusenbury* vs.

N. Y. W. & C. Traction Co., quoted under Point XI *supra*.

This is the law in other jurisdictions.

In *Newport, etc., R. Co.* vs. *Hampton, etc., R. Co.*, 102 Va., 795, it was held (page 807):

"If from any cause appellee has forfeited its "right to lay its tracks and operate its cars on and "over Mellen Street, such forfeiture cannot be tak-"en advantage of in a private action, and can only "be enforced on behalf of the public at the election "of the State" (Citing cases in this and other States).

In *Fletcher* vs. *Peck*, 6 Cranch, 87, the legislature of Georgia attempted to annul a grant of State lands made by a previous legislature.

The Court held that the grant under the first enactment constituted, when accepted, a contract within the protection of the Federal Constitution and that the second enactment, being an impairment of the contract, was void.

In *Buffet* vs. *Grt. Western R. R. Co.*, 25 Ill., 310, 314, we read:

> "It is not doubted that the legislature is pro-"hibited, by the constitution, from exercising "the power of judicially determining and de-"claring that a contract is forfeited between "individuals. And no reason can be perceived "why it should be exercised when the State it-"self is a party to the agreement. The power, "in either case, is by the constitution devolved "upon the courts, and is consequently prohibit-"ed to the legislative department. It then fol-"lows that this act, so far as it may have been "designed to declare a forfeiture of the charter

"of the Great Western R. R. Co. and to dissolve "that party, is prohibited by the court and is "inoperative and void."

And it is further ordered that upon the amendment of the remittitur as aforesaid it be returned to the Supreme Court in and for the County of New York.

(A copy).

JNO. H. REYNOLDS,
Deputy Clerk.

Seal. Court of Appeals,
State of New York.

EXHIBIT B.

Amendment Inserted in the Remittitur.

And afterwards, to wit, on April 22nd, 1914, a motion having been made, on the return of an order to show cause, by the attorney for the appellant, for an amendment of the remittitur herein, which motion was "granted to the extent of amending the "remittitur so as to recite therein the submission "of the 12th point in the appellant's brief, setting "forth said point in full;" remittitur is hereby amended in accordance with the order of this Court dated April 28th, 1914, attached hereto and made a part hereof.

[The order printed as Exhibit A (*supra*) was attached to the remittitur].

Office Supreme Court, U. S.
FILED
OCT 13 1914
JAMES D. MAHER
CLERK

Affidavit in Opposition to Motion for Writ of Certiorari for Diminution of the Record.

Supreme Court of the United States.

THE NEW YORK ELECTRIC LINES COMPANY,
Plaintiff-in-Error,

against

EMPIRE CITY SUBWAY COMPANY,
Respondent-Defendant-In-Error.

October Term, 1913—No. ~~370~~. 63

STATE OF NEW YORK, *County of New York*, } ss.:

I, EDMUND L. MOONEY, Counsel for the Respondent-defendant-in-error, being duly sworn, depose and say:

The Respondent-defendant-in-error hereby opposes the motion of the Plaintiff-in-error for a writ of certiorari for diminution of the record herein so as to include in the transcript thereof filed in this Court only the order made in this cause by the Court of Appeals of the State of New York on the 28th day of April, 1914, and the amendment made to the remittitur herein pursuant to said order, for the following reasons:

By the stipulation entered into between the attorneys for the respective parties herein dated May 1, 1914, and which is incorporated and set forth at length in the affidavit of Wayne W. Wilson, upon which this motion is based, it was provided that not only the aforesaid order and the amendment made to the remittitur herein pursuant to said order should be filed as part of the record before this Court, but that, in addition thereto, there should also be filed with this Court the said stipulation, together with the papers thereto annexed, namely, the order to show cause, dated April 18, 1914, why said order should not be made, the affidavit of Wayne W. Wilson, sworn to April 18, 1914, the affidavit of Alton B. Parker, sworn to April 17, 1914, the affidavit of J. Aspinwall Hodge, sworn to April 18, 1914, in support of the motion on the return of said order to show cause, and the affidavit of Charles T. Russell, sworn to April 22, 1914, and the affidavit of Edmund L. Mooney, sworn to April 22, 1914, in opposition thereto. It was also provided by said stipulation that those papers should be "handed "to the Court on or before the argument herein, "with the same effect and no other as if a writ "of certiorari had been issued out of this Court "to the Supreme Court of New York, directing a "return to this Court of the above mentioned pa-"pers, and as if the above mentioned papers had "been so returned." It was also provided by said stipulation that the relator would "forthwith cause this stipulation, together with the exhibits hereto annexed, to be printed and presented to this Court on or before the argument herein." That stipulation has not been revoked, withdrawn or cancelled, and is still in full force and effect. In pursuance of that stipulation, and on or about

the 1st day of May, 1914, the said stipulation, together with the aforesaid papers thereto annexed, were printed by the Relator entitled "Stipulation and Supplemental Record" and three copies thereof, one of which is submitted herewith, were served upon me as the Counsel for the Respondent. Consequently, and as said stipulation was made, as is recited therein, "with the same effect and no other as if a writ of certiorari had been issued out of this Court to the Supreme Court of New York, directing a return to this Court of the above mentioned papers and as if the above mentioned papers had been so returned," there is no necessity now for a writ of certiorari herein for a diminution of the record, unless it be that the relator desires to avoid the effect of said stipulation and to have, by the writ now sought, the transcript of the record in this Court contain only the said order of the Court of Appeals dated April 28, 1914, and the amendment made to the remittitur pursuant to said order, as is asked for in the motion, without the papers upon which said order was made and the aforesaid stipulation concerning the same.

Furthermore, by said stipulation there was preserved to the Respondent the right to object upon the argument of the appeal herein before this Court, as follows:

> "That the Court of Appeals of the State of New York had no power or authority to direct the return of said remittitur, or to amend the same or return the same to the Supreme Court of the State of New York, that this Court upon the return should not under the practices in such cases prevailing consider the said papers, or any of them, as properly part of the record."

The effect of granting this motion for a writ of certiorari for dimunition of the record might be: to nullify the aforesaid stipulation which was made in lieu of the writ now sought; to present to this Court the order of the Court of Appeals dated April 28th, 1914, without the papers upon which it was made; to prevent this Court from examining the papers upon which said order amending the remittitur was made; to deprive the respondent of the benefit of having before this Court the papers mentioned in said stipulation; and to prevent the respondent from urging upon this Court the aforesaid objection to the power of the Court of Appeals to make the said order. Without said papers the facts and circumstances involved in plaintiff-in-error's application to the Court of Appeals for amendment of the remittitur would not appear before this Court, nor would the grounds of respondent's opposition to such application be shown, all of which I verily believe will be necessary in order for this Court to determine whether or not the above quoted objection is well founded.

Plaintiff-in-error did not apply for a writ of error until October, 1912. The printed record in this Court was prepared and served on December 12, 1912. Not until April 22, 1914, and after the brief of defendant-in-error had been served on counsel for the plaintiff-in-error, was any Federal question attempted to be raised. On that day the plaintiff-in-error applied to the Court of Appeals upon the return of an order to show cause, dated April 18, 1914, for a certificate certifying

> "that Federal questions were raised by the Relator-Appellant before the Court of Appeals, to wit:

That the franchise possessed by the relator was irrevocable by the state or any of its agents and that the resolution of the Board of Estimate and Apportionment of the City of New York passed on the 11th day of May, 1906, and purporting to revoke the said franchise, was unconstitutional and invalid in that it violated the provision contained in Article I, Section 10 of the Constitution of the United States, providing against the impairment of the obligation of contracts, and in that it violated the provision contained in Section I of the XIV Amendment of the Constitution of the United States providing that no State shall deprive any person of life, liberty or property without due process of law,—and that said federal questions were decided by this Court against the appellant and in favor of the revocability of said franchise and of the validity of said resolution or ordinance revoking the same; why the remittitur in the above entitled action should not be amended by adding thereto said certificate; why a duplicate original of said certificate or a certified copy thereof under the seal of this Court should not be delivered to the relator's attorney for presentation to the Supreme Court of the United States, should he be so advised; and why the appellant should not have such other further, like or different relief, to the end that it may further and more clearly appear herein that said federal questions were duly raised and decided by this court against the contentions made by the relator that its franchise was irrevocable, because protected by the aforesaid constitutional guarantees and in favor of the contention of the respondent that the said revoking resolution of May 11th, 1906, was valid."

The motion was opposed by the defendant-in-error, and in view of that opposition the Court of Appeals did not make a certificate that a federal question was involved nor amend its remitti-

tur to show that such a federal question had been presented, but made an order, dated April 28, 1914, directing merely that the remittitur of that Court be amended by adding thereto and incorporating therein the statement that there was submitted to that Court a brief by Counsel for the appellant therein and plaintiff-in-error herein containing a point designated as "XII", which is set forth at length in said order.

That is the order which the plaintiff-in-error seeks by this motion to have made part of the transcript of the record herein, filed in this Court, but without the papers upon which it is based.

If the motion were to be granted, the result would be that there would be no record or papers before this Court showing that the Court of Appeals had in effect refused to certify that a Federal question was argued or involved in that Court and that it had refused, in effect, to give a certificate that such a Federal question was involved.

If this Court decides to grant the motion, we ask that there be incorporated in the decision thereon a provision that the papers upon which the order amending the remittitur was granted be made part of the record with the said order. Otherwise the above mentioned stipulation between the parties will be vitiated to the prejudice of the respondent-defendant-in-error, and this Court will have before it only a partial record of the proceedings to amend the remittitur in the Court of Appeals of the State of New York.

EDMUND L. MOONEY.

Sworn to before me, this
8th day of October, 1914.

CHARLES F. QUANTRELL,
Notary Public,
Kings Co., Cert. filed in N. Y. Co.

Seal

Office Supreme Court, U. S.
FILED
OCT 13 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 870 63.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY, (Limited),
Respondent-Defendant-in-Error.

BRIEF OF RESPONDENT-DEFENDANT-IN-ERROR IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI FOR DIMINUTION OF THE RECORD.

EDMUND L. MOONEY,
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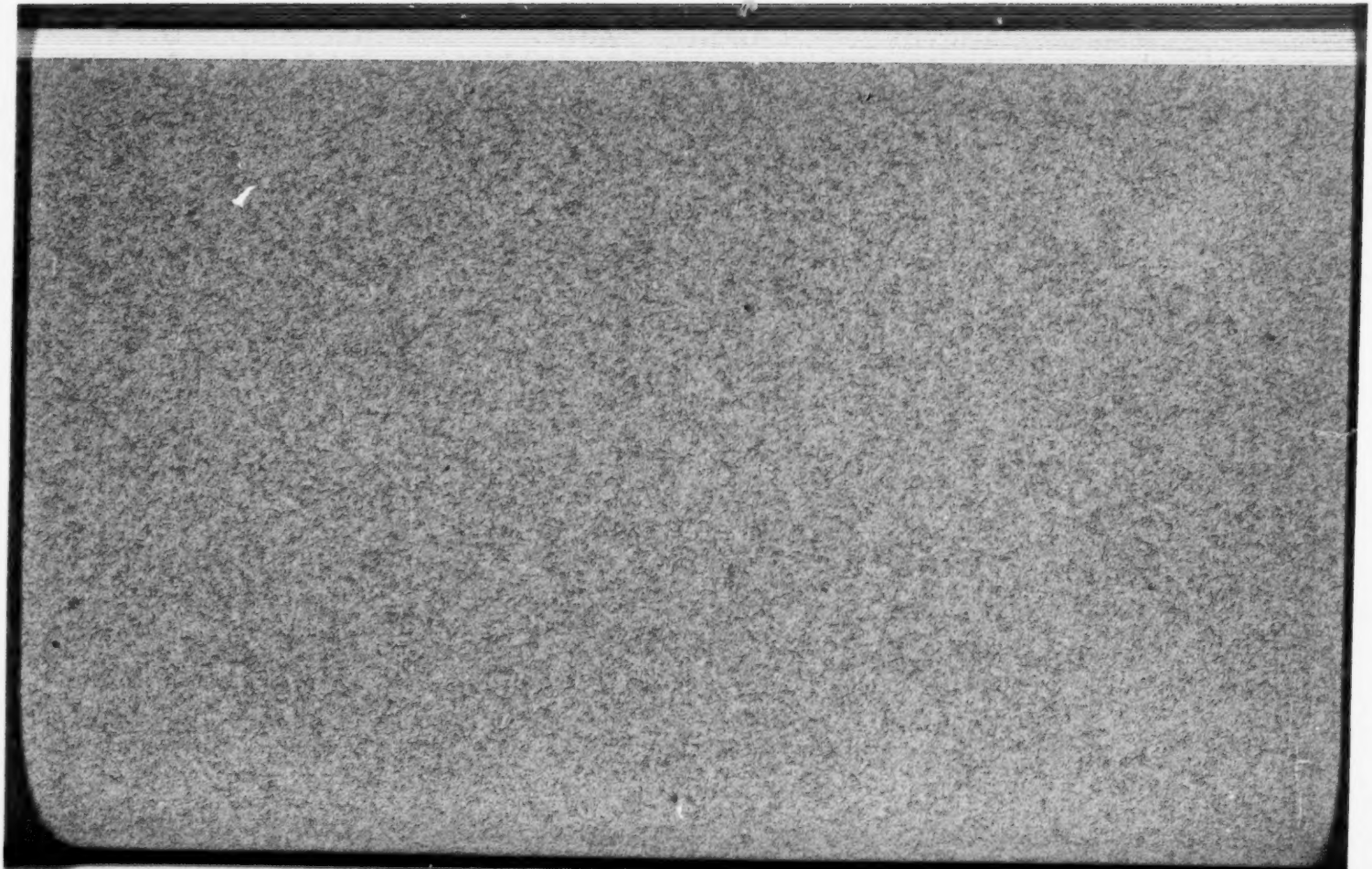
EDMUND L. MOONEY,
CHARLES T. RUSSELL,
Of Counsel.



Supreme Court of the United States.

THE NEW YORK ELECTRIC LINES COMPANY,
Plaintiff-in-error,

against

EMPIRE CITY SUBWAY COMPANY (Limited),
Defendant-in-error.

October Term, 1913—No. 370.

Brief of respondent-defendant-in-error in Opposition to motion for Writ of Certiorari for Diminution of the Record.

The Respondent-Defendant-in-error opposes the motion for a writ of certiorari for diminution of the record herein, to be directed to the Supreme Court of the State of New York, so as to include therein the order made by the Court of Appeals of the State of New York, on the 28th day of April, 1914, and the amendment made to the remittitur by reason of said order, not now contained in the transcript of record herein, filed in this Court, upon the following grounds:

By the stipulation dated May 1st, 1914, set forth at length in the moving affidavit, it was agreed

that not only the afore-mentioned order, and the amendment to the remittitur herein pursuant to said order, but, in addition thereto, all of the papers recited in the order and upon which it is based, together with the stipulation, should be printed and presented to this Court on or before the argument herein, and should be filed as part of the record before this Court "with the same effect and no other, as if a writ of certiorari had been issued out of this Court to the Supreme Court of the State of New York, directing the return to this Court of the above mentioned papers, and as if the above mentioned papers had been so returned."

These papers have been printed by the plaintiff-in-error, and are contained in a separate cover entitled: "Stipulation and Supplemental Record." Three copies thereof have been served upon the Counsel for the defendant-in-error; and supplemental briefs upon the questions raised thereby have been served by both parties. Consequently, there is no necessity for this motion, unless it be that the plaintiff-in-error is seeking to avoid the stipulation, and thereby avoid presenting to this Court all the papers mentioned therein. That stipulation has been acted upon by both parties, and is still in full force and effect. Without these papers the defendant-in-error might not be entitled to raise the following objection to the Order of the Court of Appeals, and preserved to it by the stipulation:

> "That the Court of Appeals of the State of New York had no power or authority to direct the return of said remittitur or to amend the same, or return the same to the Supreme Court of the State of New York; that this Court upon the return should not, under the practice in such cases prevailing,

consider the said papers or any of them, as properly part of the record herein."

The defendant-in-error desires to present that objection to this Court upon the argument herein, for the following reasons:

(a) *The Court of Appeals of the State of New York had no power to amend the remittitur after the lapse of three years from the time this Court had issued its writ of error, and the order purporting to amend should not be made a part of the formal record in this Court.*

In this case, the certification of Point 12 of the relator's brief was made by the Court of Appeals three years after the writ of error had been granted by this Court and long after the record and proceedings had been transferred to this Court. When the certification was made, therefore, the Court of Appeals of the State of New York did not have the case before it and had lost control of the record, so that said certification could not become a part of the record. In *Home for Incurables* vs. *The City of New York*, 187 U. S. 155, it was held that a certificate of the Chief Judge of the Court of Appeals of the State of New York to the effect that Federal questions were raised and decided, made at a time when the case was not before it or under its control, was not a part of the record and could not give this Court jurisdiction to determine a Federal question not appearing otherwise from the record to have been brought to the attention of the State Court (Page 158). The certification of the brief was also improper because it was made after the rendition of final judgment without a rehearing upon the merits: *Miller* vs. *Cornwall Railroad*

Company, 168 U. S. 131-134; *Weber* vs. *Rogan*, 188 U. S. 10-14.

(b) *The so-called amended remittitur, containing Point 12 of the Relator's brief in the Court of Appeals should not be considered in determining whether any Federal question was raised or decided in the Court of Appeals of the State of New York.*

The certification of Point 12 of the Relator's brief in the Court of Appeals, although in the form of an order purporting to amend the remittitur, merely certifies that Point 12, and the matter contained therein, was submitted to the Court on the argument of the appeal. It certainly can have no other or greater effect than to present to this Court part of the argument of counsel, verified as correct by the certificate or order.

It has several times been held by this Court that arguments of counsel form no part of the record. *Gibson* vs. *Chouteau*, 75 U. S. (8 Wall.) 314-318; *Sayward* vs. *Denny*, 158 U. S., 180-184.

In *N. Y. C. & H. R. R. R. Co.* vs. *City of New York*, 186 U. S. 269, the appellant, in an attempt to show the raising of a Federal question, relied upon a copy of its brief, certified by the Chief Judge of the Court of Appeals of the State of New York, as containing certain matters. In the opinion of this Court last cited the case of *Zadig* vs. *Baldwin*, 166 U. S. 485, is cited and quoted from as showing that the brief did not become a part of the record and could not raise a Federal question when the record did not disclose that it was otherwise raised. Hence, the brief is not to be considered as a part of the record in this Court

in determining whether a Federal question was raised and decided in the State Court.

Whatever may be considered to be the effect of the briefs submitted to the State Court, it seems to be settled in this Court that they cannot, in themselves, be considered as sufficient to raise a Federal question, not otherwise properly appearing to have been raised by the record.

As we have noted, they do not become a part of the record proper. In *Glenn* vs. *Garth*, 147 U. S. 360, it was said in the opinion of this Court (Page 370): "Nor can the contention of counsel, that the Virginia Statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the Constitution or laws of the United States."

The reason for the insistance of this Court that the Federal question shall be raised in the Court below and the fact that it was raised clearly appear from the record, is stated in the opinion of Mr. Justice Taney in *Grand Gulf R. R. & Banking Co., etc.* vs. *Marshall*, 53 U. S. (12 Howard) 165, to be that if the appellant omits to raise the point properly on the record, there is no reason to permit him to harass the adverse party by a writ of error to this Court, when, for aught that appears in the record, the judgment of the State Court might have been in his favor if its attention had been directed to the question. Hence, the rule is just that the omission to raise the question properly in the record cannot be cured by the briefs or arguments of counsel, and certainly it should not be held to be cured by the certification of a portion of the brief of the relator in the Court below made three years after the granting of the

writ of error by an order amending the remittitur.

The plaintiff-in-error applied to the State Court for a formal certificate stating that a Federal question had been raised and determined, but succeeded only in obtaining a certification of Point XII of its Brief in the State Court.

The plaintiff-in-error fearing that the Federal question was not raised by the record, tried to cure this defect by obtaining a formal certificate, and failing to obtain it now seeks to give an unwarranted effect to a mere certification of a part of its *brief* in the State Court by the amended remittitur.

We contend now, as heretofore, that no Federal question was raised by the record, that the opinion of the Courts below did not pass upon any such question nor did the brief raise it.

(c) *If the motion were to be granted, the result would be that there would be no record or papers before this Court showing that the Court of Appeals had in effect refused to certify that a Federal question was argued or involved in that Court, and that it had refused, in effect, to give a certificate that such a Federal question was involved.*

If this Court decides to grant the motion, we ask that there be incorporated in the decision thereon a provision that the papers upon which the order amending the remittitur was granted be made part of the record with the said order. If such a provision be not inserted in the order, the above mentioned stipulation between the parties will be vitiated to the prejudice of the re-

spondent-defendant-in-error, and this Court will have before it only a partial record of the proceedings to amend the remittitur in the Court of Appeals of the State of New York.

Respectfully submitted,

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